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In the Supreme Court of the United States

OCTOBER TERM, 1964

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WELLINGTON MILL DIVISION, WEST POINT MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
A. The Board's findings of fact	3
B. The Board's conclusions and order	10
C. The decision of the court of appeals	10
Reasons for granting the writ	11
Conclusion	17
Appendix A	18
Appendix B	49

CITATIONS

Cases:

Allegheny Pepsi-Cola Bottling Co. v. *National Labor Relations Board*, 312 F. 2d 529	16
American Rubber Products Corp. v. *National Labor Relations Board*, 214 F. 2d 47	16
Johnston v. *Wellington Mfg. Div.*, 49 LRRM 2536	10
Martel Mills Corp. v. *National Labor Relations Board*, 114 F. 2d 624	13
National Labor Relations Board v. *Houston Chronicle Publishing Co.*, 300 F. 2d 273	16

Cases—Continued

Page

National Labor Relations Board v. *Texas Independent Oil Co.*, 232 F. 2d 447..... 16
National Labor Relations Board v. *Threads, Inc.*, 308 F. 2d 1.....11, 12, 13, 14
National Labor Relations Board v. *United Brass Works, Inc.*, 287 F. 2d 689.....11, 13, 14
National Labor Relations Board v. *Walton Manufacturing Co.*, 369 U.S. 404..... 14, 15
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474.... 2, 11, 12, 14, 15

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*)
Section 2(2)..... 16, 49
Section 2(13)..... 16, 49
Section 7.....10, 15, 49
Section 8(a)(1).....4, 10, 50
Section 8(a)(3)..... 10, 50
Section 10(e)..... 50
Section 10(j)..... 10

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WELLINGTON MILL DIVISION, WEST POINT MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 18-47) is not yet reported. The findings of fact, conclusions of law, and order of the Board (P.A. 1-61)[1] are reported at 141 NLRB 819.

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[1] "P.A." refers to the appendix to the Company's brief filed in the court of appeals; "B.A." refers to the appendix to the

JURISDICTION

The decision of the court of appeals was rendered on March 25, 1964, and a decree was entered on the same day (pp. 47-48, *infra*). On June 24, 1964, the Chief Justice extended the time within which to file a petition for certiorari to and including July 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. In reviewing findings of the National Labor Relations Board that an employer's discharge of an employee, although allegedly for cause, was in fact because of the employee's union activities, the Court of Appeals for the Fourth Circuit applies the rule that such findings will be reversed whenever the employee has been guilty of prior misconduct similar to that for which he was assertedly discharged. The question presented is whether the application of this rule violates the standard of judicial review laid down in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488.[2]

Board's brief. References to the transcript are designated "Tr." References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

[2] Although the court of appeals applied this rule expressly only in reversing the Board's findings with respect to the discharge of employee Allen, we contend that the court also misapplied the *Universal Camera* standard in setting aside the findings respecting employees Evans and McKinney. See note 11, *infra*, p. 14.

2. Whether the Board properly held the employer responsible for the action of its personnel director in forming an antiunion group, without specific proof that the employer was aware of or ratified his action.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), are set forth in Appendix B, *infra*, pp. 49-50.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In August 1961, the Textile Workers Union of America, AFL-CIO ("the Union"), began to organize the employees at respondent's ("the Company's") textile mill in Anderson, South Carolina. Employees Milford Allen and H. C. McKinney, Jr., actively participated in the campaign, visiting the homes of their fellow workers to solicit their support (P.A. 35, 50; B.A. 20-21, 29, 33).

The Company's officers announced their opposition to the Union [3] and embarked on a course of conduct to counter the organizing campaign. The following incidents, *inter alia*, occurred between September 14 and September 24: [4]

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[3] Calhoun, the Company's vice-president, informed his supervisors that "the union could hurt us, and we weren't going to go along with them" (P.A. 10, 35, 63; B.A. 9). See also P.A. 11, 3, 25; B.A. 4-5, 88-90, G.C. Exh. 11.

[4] Although we are not challenging the court of appeals' conclusion that only one of these incidents amounted to a vio-

(1) McKinney was interrogated by his overseer with respect to the Union's organizing efforts (P.A. 12; B.A. 35). The overseer informed McKinney that he would "hate to see him involved" with such efforts (P.A. 50; 165, B.A. 35, 47-48).

(2) A vice-president of the Company called groups of employees into his office and told them that the Union could do them no good, that it could do them some harm, and that the Company would fight the Union "to the last ditch" (P.A. 28, 13; B.A. 6-7, P.A. 177).

(3) The Company rejected a Union request for recognition and posted an announcement stating "the Company's position * * * that if the Union were to come in here, it would work to your serious harm" (P.A. 29, 11; 222, B.A. 4-5).

(4) Jordan, the Company's personnel director, organized an anti-union "Citizens Club" by canvassing each of the three shifts of employees and recording the names of those who were willing to join such a group. He then gave the list to an interested employee "to take it from there * * *" (P.A. 15, 22-24; B.A. 9-12, 103-106).

(5) Bryant, an employee who was active in soliciting for the Union and who displayed his union committee button in the mill, was told by a supervisor, "for your own interest and the interest of your job"

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lation of Section 8(a)(1) (except with respect to the action of the personnel director, see pp. 15-17, *infra*), they are nonetheless relevant here insofar as they relate to the Board's finding concerning the Company's motives for discharging certain employees.

he had better turn in his union badge. After the warning was repeated, Bryant arranged an interview with the Company's vice-president and its plant manager, during which he threw his button into the trash can (P.A. 18-19; B.A. 63-66).

The evidence regarding the personnel director's conduct showed that he had suggested to Ivester, an employee, that an anti-union group be organized. Ivester, though amenable, expressed concern "whether we can get anybody to go along with it" (P.A. 15; B.A. 10-11). Jordan thereupon canvassed the mill for recruits, interrogating employees as to their willingness to meet and discuss "the problem" and recording the names and addresses of those who assented (P.A. 15; B.A. 103-104). In his words, "I had to go three times. I went on all three shifts [because] I thought it would be best to get some from each shift" (B.A. 103). When he had compiled a list of 15-25 employees, Jordan turned it over to Ivester "to take it from there * * *" (P.A. 15, 22; B.A. 10-12, 104). Ivester sent out invitations, and the "Citizens Club" came into existence, with Ivester as its chairman (P.A. 22, 23-24; B.A. 11, 9). Meanwhile, an employee who had been approached by Jordan but declined his overture was asked by her overseer what she thought of the Union and whether she "had always been happy down there" (P.A. 15-16; B.A. 86-87).

On September 25, Allen and McKinney, accompanied by employees Evans and Walker, told Snipes, the overseer of weaving, that they had heard rumors that all the union leaders were going to be fired with-

in a week (P.A. 36; B.A. 23, 59-60, 47, 28, 166-167). Snipes denied this. Allen then asked "Mr. Snipes, you know we are active in the union, don't you?" Snipes answered, "Yes," and then hesitated and reddened (P.A. 36; B.A. 23). In response to an inquiry by McKinney as to whether the work of the men was satisfactory, Snipes replied that it was "so far." He then added, "I have said too much already" (P.A. 36; B.A. 36, 60, 24, P.A. 67). Some seven hours later, Allen was discharged. McKinney's dismissal followed three days later. Evans' employment was also terminated after he resisted supervisory inducements to turn in his union button.[5]

(a) *Milford Allen.*—Allen, a weaver, had worked in the mill continously since 1938 save for four years' military service (P.A. 35; B.A. 20). Overseer Snipes considered him a highly skilled weaver, and during his 19-year tenure he was reprimanded but once, in August 1961, when his second hand (supervisor) "had to talk to him about not inspecting his cloth" as should have been done during the first hour of the shift (P.A. 35-36, 37; 220, 181-183).[6] In the weave room, where Allen worked, there were no prescribed meal or "break" periods, nor were employees required to obtain supervisory approval before

[5] Walker had stopped wearing his union button after respondent's officials made plain their opposition to the Union (P.A. 45; B.A. 58-61).

[6] The Company records infractions as "warnings" and "incident reports," the latter being used for less serious matters. Allen's omission was the subject of an "incident report" (B.A. 97, 98, 105; P.A. 183).

leaving their work stations. They were permitted absences at reasonable times for meals, coffee, water, soft drinks, smoking, and trips to the washroom (P.A. 39; B.A. 25-26, 46, 57, 75-77).

On September 25 (as the trial examiner found from conflicting evidence), Allen was away from his looms approximately four times during the eight hours between 3:00 p.m. and 11:00 p.m. (P.A. 39-40; B.A. 29, Tr. 292, P.A. 183, 124, B.A. 89-90). His absences were: 15 minutes for supper at 4:30; 10 minutes at 6:30 and 8:00 (the latter for coffee); and 15 minutes at 10:00 (*ibid.*). At about 10:15 p.m., 45 minutes before the end of the shift, the second hand told Allen that he had been off his job four or five times and that some of his looms had stopped.[7] He sent Allen home with instructions to return and see Overseer Snipes the next morning (P.A. 36; B.A. 24, P.A. 183). Allen said to the supervisor, "Robert, you know why you are firing me, it is because of union activity" (P.A. 36; B.A. 24). The second hand replied that he could not help it since "I have got orders to let you go. I am only carrying out orders" (*ibid.*). The next morning, when Overseer Snipes told Allen that he had been reported off his

[7] Looms shut off automatically in case of mechanical breakdown and whenever the warp or filling breaks. Only the latter is repairable by the weaver. When there is a mechanical failure, the weaver must "flag" a loom fixer (P.A. 40; B.A. 27-28). A set of 29 looms like Allen's will average about 60 stops an hour, and a particular loom stoppage cannot be predicted or prevented. One loom fixer testified that the weaver "doesn't have no control over them, he might be starting one up, and five would stop behind him" (P.A. 40-41; B.A. 28, 60, P.A. 92, Tr. 470-472).

job four times and therefore had been discharged, Allen protested that he had followed the same routine for 15 years "and this didn't come up until the union got to organizing" (P.A. 37; 168, B.A. 25). Snipes denied Allen's allegation that he had been fired because of union activity. He also said that he was "sorry" that Allen "got tangled up in this mess" (P.A. 37; 168, B.A. 25).

(b) *Luther Evans.*—Evans was among the employees wearing union buttons in the mill. On September 26, his second hand told Evans that Bryant had turned in his union button and urged him to do likewise (P.A. 19; B.A. 14). Evans refused, but the supervisor persisted, returning to Evans' work station later that night (P.A. 19-20; B.A. 15). According to Evans' testimony, which the trial examiner and the Board accepted, the second hand also suggested that if he cooperated Evans might have a chance to be promoted to second hand (P.A. 20; B.A. 15).[8] Evans was still unpersuaded (*ibid.*). On the following day, when Evans reported to work, the second hand took him to the office where his overseer announced that the Company had "no more work available" for him (P.A. 43; B.A. 16-17). In its answer to the complaint in this case, the Company admitted that it "terminated" Evans on September 27, 1961 (B.A. 3).

(c) *H. C. McKinney.*—Like Allen, McKinney was a long-time mill employee and a leader in the union

[8]The supervisor's denial that he made these statements was specifically discredited (P.A. 20, n. 21).

movement (P.A. 40-50; B.A. 32). He was discharged on September 28 under the following circumstances: The Company had procured copies of an anti-union magazine article which it distributed throughout the mill and permitted employees to peruse during their working time (P.A. 3, 25-27: B.A. 88-89, 95-96, G.C. Exh. 11, B.A. 94-95, 73-74, 3, 80-85, 67, 69). On the evening of September 28, McKinney, who had not been given the magazine, borrowed a copy from one of the weavers. Noting one paragraph describing the Union's support of certain strikers, he proceeded, during time when he was not occupied,[9] to show it to a number of his fellow employees (P.A. 50; B.A. 37-44). One of the men complained to the second hand, who told McKinney that this violated a Company rule, posted about a week earlier. The rule prohibited "union organizing activities in the plant during working hours" and decreed that "anybody who does so and thereby interferes with his own work or the work of other will be discharged" (P.A. 51, 25; B.A. 36, P.A. 187-188, 223). The supervisor then said that he had orders to let McKinney go (P.A. 51; B.A. 36-37). McKinney, like Allen, was directed to leave immediately and to see Overseer Snipes in the morning (*ibid.*). A few minutes after McKinney departed, Williamson told one of the weavers that "he had his orders," and "it was McKinney's job or his" (P.A.

[9] The smash hand's job is to make repairs as these are needed; they are designated by the weaver posting the loom number on the "smash board" (B.A. 32-33, P.A. 162-163). When the smash board is empty, the smash hand is "caught up," a not infrequent occurrence (B.A. 41, 57).

51; B.A. 77-78). On the following morning, McKinney was told by Snipes that "there's nothing wrong with your work," but Snipes wrote on McKinney's separation notice, "Discharged for hindering other employees from running their job" (P.A. 52; 171, 221).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board, agreeing with the trial examiner, concluded that the Company had interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act (P.A. 2, 33-34), and that it had discharged Allen, Evans and McKinney because of their union activity, thereby violating Sections 8(a)(3) and (1).[9a] In the Board's view, the Company's assigned reasons for discharging the three employees were pretexts concealing its discriminatory purpose (P.A. 2-6, 38-42, 44-49, 53-55). Accordingly, the Board ordered the Company to cease and desist from infringing upon its employees' rights under Section 7 of the Act; to reinstate the three dischaged employees with back pay; and to post appropriate notices (P.A. 4, 57-61, 7).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, Judge Bell dissenting, rejected the Board's findings and conclusions with one

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[9a] Pending the Board's decision, the district court, finding reasonable cause to believe that unfair labor practices had been committed, issued a temporary injunction under Section 10(j) of the Act. *Johnston* v. *Wellington Mfg. Div.*, 49 LRRM 2536 (W.D. S.C.).

exception.[10] Respecting Allen, it concluded that the Board could not find that the Company's explanation for his discharge was a mere pretext, in light of Allen's prior similar misconduct. The court held that this aspect of the case was "controlled by" its earlier decisions in *National Labor Relations Board* v. *Threads, Inc.*, 308 F. 2d 1, and *National Labor Relations Board* v. *United Brass Works, Inc.*, 287 F. 2d 689 (pp. 27-33, *infra*).

REASONS FOR GRANTING THE WRIT

1. By applying an inflexible rule which it has fashioned and developed in three earlier decisions, the Court of Appeals for the Fourth Circuit has "displace[d] the Board's choice between two fairly conflicting views" on an issue of fact, in violation of this Court's ruling in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488. The adoption and repeated application of this erroneous rule in the Fourth Circuit will disrupt the uniform administration of the national labor policy unless corrective action is taken by this Court.

a. After a full hearing during which witnesses for both sides were examined, the Board's trial examiner concluded that the Company's real reason for discharging Allen was his union activity, and that his alleged misconduct was merely a pretext. This con-

[10] The court sustained the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening Bryant with reprisal in order to induce him to turn in his union button (pp. 23-24, *infra*).

clusion had substantial support in the record, which demonstrated not only that the Company was overtly hostile to the Union's organizing activity, but also that it manifested this hostility by veiled threats directed to Union organizers. Allen's absences from his machine on four occasions on September 25 were not of unreasonably long duration, nor were they unusual in light of the Company's flexible policy. Allen's excellent work record, the overseer's comments made shortly before the discharge, and the statement made by the supervisor who discharged Allen all buttressed the examiner's conclusion regarding the Company's true motive, which was adopted by the Board.

Notwithstanding this evidence, the court of appeals set aside the Board's finding on the ground—previously announced "and not for the first time" in *National Labor Relations Board* v. *Threads, Inc., supra*—"that there is no legal basis for finding that the assigned reason for a discharge is a mere 'pretext' where it is shown that the employee concerned was guilty of prior misconduct under circumstances which tend to negate any idea that the employer was searching for some false but plausible reason to be advanced in support of a discharge which was, in fact, discriminatory and based upon Allen's union activities" (pp. 29-30, *infra*). In effect, this decision amounts to a holding that the Board may never disbelieve an employer's assertion that he has discharged an employee for misconduct if the employee has been guilty of similar misconduct in the past, regardless of the other circumstances of the discharge. Such a gloss on the standard of review announced in *Universal Camera*

is inconsistent with the principles of that decision and constitutes an unwarranted invasion of the Board's primary obligation to determine the material facts in the cases brought before it.

b. The inflexibility of this rule as well as the fact that it represents a firmly committed policy in the Fourth Circuit is demonstrated by the earlier decisions upon which the court of appeals relied. In both *National Labor Relations Board* v. *Threads, Inc.*, 308 F.2d 1, 11-13, and *National Labor Relations Board* v. *United Brass Works, Inc.*, 287 F.2d 689, the Fourth Circuit set aside Board findings that the discharge of certain employees had been prompted by antiunion motives. In each instance, the court relied on the employee's record of prior misconduct, and concluded therefrom that the Board could not reject the employer's claim that the misconduct had caused the discharge. These decisions, in turn, were based upon the same court's earlier holding in *Martel Mills Corp.* v. *National Labor Relations Board*, 114 F.2d 624, 631-632, a case that was decided before *Universal Camera*. A comparison of the facts of this case with those of *Threads* and *United Brass* discloses that the principle has gradually evolved into a rigid rule which would now license discriminatory discharges in the Fourth Circuit of any employee who has a record of prior misconduct. For under this line of decision it is immaterial whether the misconduct occurred before the employer became aware of the employee's union activity (as in this case) or after (as in *Threads* and *United Brass*); whether the employee's lapse was a

solitary one (as in this case) or one in a series (as in *Threads* and *United Brass*); whether the misconduct had been considered serious by the employer (as in *United Brass*) or trivial (as in this case); and whether the other evidence of discriminatory motive was great (as in *Threads* and this case) or slight (as in *United Brass*). The rule fashioned by the Fourth Circuit has thus developed into a special test for passing upon the substantiality of evidence in cases involving an allegedly discriminatory discharge of an employee who has some prior record of misconduct.[11]

c. In *National Labor Relations Board* v. *Walton Manufacturing Co.*, 369 U.S. 404, this Court reversed judgments of the Court of Appeals for the Fifth Circuit which were shown to have been based upon a misapprehension or gross misapplication of the standards of review announced in *Universal Camera*. The present case involves a similar departure—marked by a series of decisions—by the Court of Appeals for the Fourth Circuit. Unless corrective action is taken by this Court, the discrepancy between the applicable standard in the Fourth Circuit and the standard elsewhere will disrupt the uniform administration of the national labor policy.

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[11] Although the rule announced by the Fourth Circuit would not apply to the discharges of Evans and McKinney, we nonetheless believe that its misapprehension of the correct standard of review affected its review of the Board's findings with respect to those employees. In each instance there was substantial evidence to support the trial examiner's conclusion that the discharge was discriminatory; and the court's refusal to sustain this finding appears to have been based solely on its determination that the Company's assigned reason was "reasonable."

The seriousness of this lack of uniformity is accentuated by the fact that the Fourth Circuit encompasses a large number of industries, including the textile industry, where organizational activity is at a high level. The classic and most effective way to choke off an organizational drive is to discharge the employees who have been most active on behalf of the union, as the Company did here. If the Board's determination that a discharge was for union activity is to be upset whenever the employer can show that the employee repeated an error which he committed in the past, or whenever the employer offers some other reasonable explanation for the discharge, the rights of employees, guaranteed by Section 7, to engage in self-organization and to form, join, or assist labor organizations will be substantially diluted. For it is relatively easy for an employer to show some plausible reason for discharging an employee and even to show that the employee has committed a similar infraction in the past. The controlling question ought not to be whether good cause for discharge existed, but whether it in fact motivated the discharge. If the Board, in light of all the circumstances, could reasonably find, as it did here, that the employee's union activity, and not his misconduct, prompted the employer's action, the proper application of the standard announced in *Universal Camera* and *Walton* requires that such a finding be sustained.

2. In addition, the court of appeals erred in overturning the Board's finding that the Company was responsible for the action of Jordan, its personnel di-

rector, in organizing the anti-union "Citizen's Club" (see pp. 4-5, *supra*). The court based its conclusion on the fact that there was "no evidence to connect either of the two principal officers, Calhoun and Swetenburg, with Jordan's assistance to Ivester" (pp. 25-26, *infra*). As the dissenting judge pointed out (p. 45, *infra*), however, the imposition of such a requirement is "contrary to both the specific language of the National Labor Relations Act and to the decided cases." Section 2(2) of the Act provides that the term "employer" includes "any person acting as an agent of an employer, directly or indirectly"; and Section 2(13) adds that "[i]n determining whether any person is acting as an 'agent' of another person * * * *the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling*" (emphasis added). The clear effect of these provisions is to make the employer responsible for the acts of major supervisors, particularly those like a personnel director, who are directly concerned with employee relations, irrespective whether such acts were specifically authorized by the highest officers of the company. See *Allegheny Pepsi-Cola Bottling Co.* v. *National Labor Relations Board*, 312 F. 2d 529, 531 (C.A. 3); *National Labor Relations Board* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9); *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 300 F. 2d 273, 280 (C.A. 5); *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 54 (C.A. 7). The contrary view of the court below not only conflicts with

these decisions but, in the words of Judge Bell, "goes far toward insulating the top echelons of management from responsibilities which are, in all fairness, undeniably theirs" (p. 47, *infra*).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8974

Wellington Mill Division, West Point Manufacturing Company,
Petitioner,

versus

National Labor Relations Board.
Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

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and

No. 9019.

Textile Workers Union of America, AFL-CIO,
Petitioner.

versus

National Labor Relations Board.
Respondent.

West Point Manufacturing Company.
Intervenor.

ON PETITION TO REVIEW AND MODIFY AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued September 30, 1963. Decided March 25, 1964.)

Before HAYNSWORTH, BOREMAN and J. SPENCER BELL, Circuit Judges.

* * * *

BOREMAN, Circuit Judge.

These consolidated cases are before the court upon petition of Wellington Mill Division, West Point Manufacturing Company, hereinafter referred to as the Company, to review and set aside an order[1] of the

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[1] The Board's decision and order are reported at 141 NLRB No. 73.

The Board ordered the Company to cease and desist from:

(a) Discouraging membership in Textile Workers Union of America, AFL-CIO, or any other labor organization, by discriminating against its employees in regard to their hire or tenure of employment or any term or condition of employment.

(b) Interrogating its employees with regard to their union membership, sympathy, or activities, in a manner violative of Section 8(a)(1) of the Act.

(c) Attempting to persuade its employees, by threats of reprisal or promises of benefit, to cease wearing or to turn in union badges or emblems.

(d) Requesting any of its employees to tell other employees that he has stopped wearing or has turned in his union badge.

(e) Suggesting that its employees organize to combat any labor organization, or assisting employees to start such a movement.

(f) Threatening its employees with reprisal because of

National Labor Relations Board following proceedings under section 10 of the National Labor Relations Act, as amended, 29 U.S.C.A. § 151 et seq., 61 Stat. 136, 73 Stat. 519, and upon the separate petition of Textile Workers Union of America, AFL-CIO, hereinafter referred to as the Union, to review a particular portion of the Board's decision. The Board has cross-petitioned for enforcement of its order against the Company and seeks denial of the Union's petition.[2] These cases were before a duly authorized panel of three Board members.

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their membership in, sympathy, or activity on behalf of any labor organization.

(g) Prohibiting its employees from discussing grievances with other employees.

(h) In any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

The Board further ordered the Company to offer to Milford Allen, Luther Jackson Evans and H. C. McKinney, Jr., full reinstatement to their former or substantially equivalent positions with back pay, together with 6% per annum interest on the back pay, the interest to be computed in the manner set forth in Isis Plumbing & Heating Co., 138 NLRB No. 97.

[2] The only question raised by the Union's petition and dealt with in its brief is whether the Company rule, which prohibits union organizational activities in the plant during working hours and provides that any employee who violates the prohibition and thereby interferes with his own work or the work of others will be discharged, is valid. The Union urges this court to declare the rule discriminatory upon the language of the rule alone as well as in the context of the surrounding circumstances of this case. The general counsel specifically declined to include in his complain before the Board any such charge of discrimination, and the Board for that reason specifically declined to consider the question but assumed *arguendo* that the rule was valid and nondiscriminatory.

The Board found that the Company violated section 8 (a) (1) of the Act, 28 U.S.C.A. § 158(a)(1), by discouraging union membership by discriminating in regard to the hire and tenure of employment of three of its employees who were active in the Union's organizational effort; by subjecting employees to repeated interrogation; by threats of harm and promise of benefit; by ordering employees not to discuss grievances and to inform other employees of their abandonment of union activity; and by suggesting and assisting in the formation of an antiunion employee group. The Board further found that the Company had violated section 8(a)(3) of the Act, 29 U.S.C.A. § 158(a)(3), by discriminatorily discharging Milford Allen, Luther Jackson Evans and H. C. McKinney, Jr., the three active union adherents mentioned above.

The Company's plant here involved is a textile mill located at Anderson, South Carolina. The top executive in the plant is Andrew B. Calhoun, the Company's vice president. The plant manager, second in command, is J. R. Swetenburg. The work in the plant is divided into three eight-hour shifts, the first from 7:00 A.M. to 3:00 P.M., the second from 3:00 P.M. to 11:00 P.M., and the third from 11:00 P.M. to 7:00 A.M.

Late in July 1961, some of the Company's employees contacted representatives of the Union and began efforts to unionize employees in the plant. A committee was formed in August and numerous employees were solicited at their homes to sign applications for union membership. Some responded favorably and signed applications while others did not. Calhoun first became aware of these union activities early in September. On September 15 the Union wrote to the Company claiming to represent a majority of the production and maintenance employees

in the plant and requested a meeting for the purpose of negotiating a contract. On or about September 20 the Company replied, declining to recognize the Union as bargaining representative of the employees until such time as it was certified by the Board. Meanwhile, on September 18 the Union had filed with the Board a petition seeking such certification.

Soon after learning of union activities, Calhoun began summoning small groups of employees into his office for discussion respecting the installation of new equipment, the Company's future plans and for the airing and consideration of any "gripes" the employes might have. At one of these meetings in Calhoun's office, about September 28, Calhoun informed the assembled employees that he did not think the Union could do them any good, that it could do them some harm and that the Company intended to oppose the Union to the last ditch. There was testimony to the effect that Calhoun said the intention was to oppose the Union by legal means. Be that as it may, the Board found the statement that the Union could do the employees some harm to be a warning constituting a veiled threat of reprisal violative of the Act. We are of the opinion that this finding and conclusion of the Board was in error. The statement by Calhoun was manifestly no more than a pronouncement of his opinion and contains no discernible threat of reprisal. We held in *N.L.R.B.* v. *Threads, Incorporated*, 308 F. 2d 1 (4 Cir. 1962), that a substantially similar statement by an employer to his assembled employees was unqualifiedly privileged under the provisions of section 8(c) of the Act, 29 U.S.C.A. § 158(c).[3]

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[3] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of

On September 20 the Company posted in its plant a notice which contained, among other things, the following language:

> "Since the Union Has Started Up a Campaign in Our Plant, Some of You Have Been Asking Questions in Regard to the Following Matters. We have Decided to State the Company's Position on These Subjects as Clearly as We Can For Everybody alike:
>
> "1. In the First Place, It Is Our Definite View That If the Union Were to Come in Here, It Would Work to Your Serious Harm."

We disagree with the Board's determination that the above quoted portion of the posted notice was coercive and violative of the Act. What we have said above respecting the statement by Calhoun applies with equal reason to such notice.

On or about September 14 Douglas Bryant, one of the Company's employees, began wearing in the plant a union badge symbolizing his adherence to the Union. On September 24 George Cromer, a supervisor in the plant, approached Bryant and said, "Doug, don't tell nobody I told you this, but for your own interest and the interest of your job, it is best that you turn in your badge." Bryant relied that he "would think about it." Later that same day Cromer again approached Bryant and said, "Doug, I wish you would turn in your badge." These statements by Cromer to Bryant were found by the Board to constitute a veiled threat of reprisal to induce Bryant not only to cease wearing the badge but to "turn it in"; in short, to thus notify the Company that he had

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an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C.A. § 158(c).

abandoned his union activities. Whether Cromer meant to imply that Bryant turn in his badge to the Company or to the Union is not made clear from the testimony and we consider this point to be relatively immaterial. The fact is that, two days later, Bryant sought and was granted an interview with Calhoun and Swetenburg, at which time he physically tendered the badge to Calhoun stating that he would like to "turn in" his badge. Calhoun demurred saying, "I don't want that badge, you can throw it in the trash can." Bryant complied with Calhoun's suggestion by discarding the badge and Calhoun then stated, by way of terminating the interview, "We believe what you have got to say, I don't know what your fellow workers in the mill are going to think about it, unless you tell them." The latter statement was found by the Board to be a direction that Bryant tell the other employees what he had done and that it constituted an illegal interference. In view of the evidence in the record before us, we are of the opinion that the statements made by Cromer were violative of the Act in that they were calculated to induce Bryant, by threat of danger of loss of his job and did successfully induce him, to relinquish a protected right, *i. e.*, the wearing of a union bade. However, we find no substantial evidential support for the conclusions of the Board that by anything he said Calhoun directed Bryant to tell the other employees what he had done. Calhoun's statement was ambiguous and could well have been intended as an admonition to Bryant not to tell the others about it and thus spare himself the possible embarassment of being considered what Bryant himself described as "a pimp to them [the company officials]."

As found by the Board from substantial evidence in the record, Ernest Ivester, a rank and file em-

ployee of the Company, during September helped to initiate and was one of the principal moving spirits behind a proposed organization of employees designated the "Citizens Club". The apparent intended purpose of the organization was to attempt to combat the organizational efforts of the Union by drawing together into discussion groups a number of employees "who were not interested in either party, either side, at the particular time." Ivester became the club's first and only chairman, addressed meetings of the club, explained why a Union would not help the employees and wrote a letter for publication in the local newspaper on the same subject. Ivester's efforts were aided to some degree by Sam Jordan, the personnel director of the plant. Jordan's assistance in this regard was limited to inquiring of some 15 to 25 employees whether they would be willing "to meet and discuss the problem. And ask any questions that they might have to ask." Jordan noted the names and addresses of those who indicated to him their willingness to attend and turned over the list to Ivester. Despite a finding by the Board that there was no evidence to connect either of the two principal officers, Calhoun and Swetenburg, with Jordan's assistance to Ivester, the Board concluded that by virtue of Jordan's conduct the Company was guilty of illegally interrogating the employees and of interfering with the employees in the exercise of their organizational rights. Here, as in *N.L.R.B.* v. *Brookside Industries, Inc.*, 308 F. 2d 224 (4 Cir. 1962), there were no threats of reprisals or coercion of any kind nor the aggressive fostering of antiunion activity decried by the courts in other cases.[4] Furthermore, there

[4] Actually, as was also found by the Board, the initial suggestion respecting the desirability of forming the "Citizens Club" came from Reverend R. C. Emory, a local minister who

is no evidence in the record that Jordan was, in collecting the names, acting in the capacity as an instrument or agent of management. See *N.L.R.B.* v. *Birmingham Publishing Company*, 262 F. 2d 2 (5 Cir. 1959). In fact, the Board's own finding of a lack of connection in this instance between Jordan and the executive officers tends to refute the claim that he was acting in such capacity.

Although not included in the complaint as a specific charge, the Board found the Company guilty of illegally restraining protected concerted activities of its employees when one of the supervisors, Carl Woods, in mid-August, told Milford Allen, one of the employees who was subsequently discharged, "Nick, I don't want you talking to nobody; you know what is going on down there." Later the same day, according to Allen's testimony, another supervisor, Snipes, asked Allen why he was dissatisfied. From these two incidents, and nothing more, the Board concluded: "Thus what Woods did was to prevent an employee known to be dissatisfied from discussing his 'gripes' with his fellow employees." The Board's conclusion in this respect seems to us to lack substantial support in the evidence. The statement made by Woods is, in itself, ambiguous and no testimony was adduced on behalf of either side to explain its meaning. The Board argues in support of its conclusion that the Company neither cross-examined Allen about the in-

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was not shown to have any connection with the plant. Reverend Emory, rather than the Company, fostered the idea of such an organization by approaching, separately, both Ivester and Jordan (and, for all the record shows, a number of others) and suggesting to them its formation. In fact, as the record reveals, Reverend Emory approached Ivester on the subject on two separate occasions urging action on the part of Ivester in organizing the group.

cident nor called Woods to testify about it. Such an attitude ignores the well established principle that the burden is on the General Counsel to prove charges of unfair labor practices by sufficient evidence and is not upon the employer to disprove them. See *National Labor Rel. Bd.* v. *Reynolds & Manley Lbr. Co.*, 212 F. 2d 155 (5 Cir. 1954). Although the Board found, from Allen's testimony, that Supervisor Snipes subsequently asked Allen why he was dissatisfied, the finding in this regard wholly ignores the reasonable explanation by Snipes to the effect that he, knowing Allen to be one who knew what was going on in the weave room and knowing that a lot of the weavers were dissatisfied for some reason, had called Allen in to ask him what he knew about the apparent general dissatisfaction. This occurrence was prior to any disclosed company knowledge of union activity in the plant. Moreover, there was no evidence adduced to show that Supervisor Woods had any knowledge or suspicion of such dissatisfaction when he made the statement complained of or that Allen had been discussing "gripes" or was expected to begin doing so. In view of our disposition of this particular matter, it is unnecessary to pass upon the question as to whether the Board had the right to pass upon it when it was not included in the complaint.

The only other matters urged as error on the part of the Board concern its findings of discrimination in the discharges of McKinney and Allen and the layoff or separation of Evans.

Discharge of Allen

Milford Allen, who initiated and actively participated in the Union's organizational efforts, had been an employee of the Company or its predecessor con-

tinuously since 1938 except for four years of military service between 1942 and 1946. He was a weaver regularly assigned to operate a set of twenty-nine looms on the second shift. During the few years immediately preceding his discharge, he had been called upon by the Company to perform a substantial amount of overtime work although the record evidence shows that Allen was a weaver of about average capacity.

On August 22, 1961, subsequent to Allen's commencement of union activity but *prior to the time when the Company or any of the supervisors became aware of such activity*, Allen's "second hand" (Williamson) made the following written report to Snipes, Allen's overseer:

> "Subject: Poor quality work.
>
> Milford Allen has been talked to about poor quality work and being off job. I told him he would have to inspect properly and I did not expect it to happen again."

The Board found that at the time of the making of the written report Williamson personally reprimanded Allen for the alleged dereliction and warned him against repetition. Apparently this was the first reprimand Allen had received in his many years of employment by the Company but it is significant, as we later note, that this warning concerning poor performance was after Allen became enthusiastically concerned with unionizing activities.

On September 25 Williamson, having observed Allen's protracted absence from his looms on several occasions during the shift, told Allen that he had been off his job four or five times and called his attention to the fact that ten of his twenty-nine looms were out of operation. He directed Allen to go home

and to return to see Overseer Snipes in the morning, the usual procedure when a second hand feels that an employee should be discharged. Allen reported to Snipes the following morning, at which time Snipes informed him of the written report of the incident, transmitted by Williamson to Snipes in the meanwhile, and told Allen that he would have to discharge him. At the time of the second alleged dereliction and the ensuing discharge, Allen's union adherence and activity were actually known to the Company. From conflicting evidence the Board, by uniformly crediting the testimony of Allen where it conflicted with that of both Williamson and Snipes, found that certain equivocal remarks, made both by Williamson at the time he told Allen to leave and by Snipes at the time he discharged Allen, indicated that the discharge was preconceived and was motivated by Allen's union adherence rather than by gross and wilful inattention to his job assignment. The Board concluded, from the Company's knowledge of Allen's union activity, the Company's demonstrated opposition and hostility to the Union and the remarks made by the supervisors, that the asserted dereliction of Allen was used by the Company as a mere "pretext" for discharging him and that the real reason for the discharge was Allen's union activity.

Although the circumstances surrounding Allen's misconduct and neglect are perhaps not as strong as those in some of our prior decisions in this area, in view of Allen's previous reprimand for the same sort of misconduct within a relatively short period prior to the second incident, this case should be controlled by our decision in *N.L.R.B.* v. *Threads, Incorporated*, 308 F. 2d 1 (4 Cir. 1962). We there held, and not for the first time, that there is no legal basis for finding that the assigned reason for a discharge is

a mere "pretext" where it is shown that the employee concerned was guilty of prior misconduct under circumstances which tend to negate any idea that the employer was searching for some false but plausible reason to be advanced in support of a discharge which was, in fact, discriminatory and based upon Allen's union activities. This principle gains added support in cases where, as here, the prior misconduct for which the employee had been specifically reprimanded and which he had been warned not to repeat was of the same nature as that assigned as the reason for the discharge. Furthermore, in *N.L.R.B.* v. *United Brass Works, Inc.*, 287 F. 2d 689, 693 (4 Cir. 1961), we held that "if discrimination may be inferred from mere participation in union organization and activity followed by a discharge, that inference disappears when a reasonable explanation is presented to show that it was not a discharge for union membership." Also, as we there held, the fact that an employee is a union member and an active movant in an organizational campaign will not shield him from release for good cause. In view of some of the hereinafter mentioned circumstances shown by the record in the instant case, we might add that neither will repeated and pointed statements or actions by the employee, designed to bring his union adherence forcefully to the attention of his employer, shield the employee from discharge for good cause when such is reasonably shown to exist.

The looms to which Allen was assigned as a weaver stop automatically in the event of mechanical failure or whenever the warp or filling breaks. It is the weaver's function, in case of such stoppage, to get the idle looms back into operation as quickly as possible and thus minimize loss of production. When the stoppage is caused by the breaking of the warp or

filling, the weaver, if he is on the job, can quickly return the loom to production. If the stoppage is the result of mechanical failure, the weaver's responsibility is to put up a "flag" for a loom fixer whose duty it is to repair and return the loom to production as quickly as possible. Of course, if the weaver is not on his job none of the causes of loom stoppage can be remedied and the machines simply remain idle. When Williamson checked Allen's set of twenty-nine looms at the time he told Allen to leave, ten of Allen's looms were not in operation and there were no "flags" up to indicate mechanical trouble. According to the undisputed testimony of second hand Williamson, all except one of these ten could have been quickly put in operation by Allen. The other loom was stopped because of a mechanical failure and, although Allen could not have restored it to operation himself, his responsibility was to put up a "flag" indicating the need for a loom fixer. Had Allen been on the job and performing his function, the machine might very well have been under repair or even back in operation at the time.

The Board in effect found that the Company's explanation tending to show that Allen's discharge was for cause and not for union membership and activity was not reasonable.

Viewed "in the light that the record in its entirety furnishes," we "cannot conscientiously find that the evidence supporting [the Board's] decision is substantial." *Universal Camera Corp.* v. *Labor Bd.*, 340 U. S. 474, 488, 71 S. Ct. 456, 465, 95 L. Ed. 456 (1951). The Board emphasizes that Allen had been a satisfactory employee over the previous term of his employment and had not until August 22, 1961, received any formal reprimands or been the subject of any adverse performance reports. However, these

circumstances do not, in this particular case, lend compelling support to the finding that the Company was motivated purely by union antipathy. In view of the fact that both incidents occurred subsequent to Allen's recently undertaken union activities, the first of which occurred prior to the time that the Company became aware of such activities, the picture portrayed is that of an employee, previously exhibiting at least average loyalty to his job and satisfactory performance, who becomes so engrossed in union and antimanagement activities that he neglects his job responsibilities. It is clear that an employer has the right to discharge any employee under such circumstances, whether he be active in union organization or not.

Also urged by the Board in support of the finding of discrimination in the discharge of both Allen and McKinney is the testimony concerning an incident on September 25 when Allen, McKinney and another employee, Walker, went to see Overseer Snipes, told him that they had heard rumors that they were going to be fired because of their union activity and informed Snipes that "if they were fired, they would take it to the National Labor Relations Board." On that occasion the three employees were obviously intent upon making sure that the overseer knew that they *were* active union adherents and members. At the time, Snipes attempted to assure the three that they would not be fired for union activity (Walker was not discharged) and, in response to their inquiry, told them that their performances as employees had been satisfactory thus far. We consider it nothing short of remarkable that the Board should find that by Snipes' remarks he bound the Company and all other supervisors to the proposition that Allen's work had been perfectly acceptable until that time.

Furthermore, it is our considered opinion that the incident and the manner in which it occurred only serve to demonstrate the antagonistic attitudes of the three employees. Their obvious purpose in seeking out Snipes and openly threatening complaint to the Labor Board was to immunize themselves against discharge for cause by setting the stage for a claim of discrimination if they were discharged. These observations respecting the September 25th incident apply with equal force to the discharge of McKinney, hereinafter discussed.

Layoff of Evans

Luther Evans was last employed by the Company on August 29, 1961, and assigned to operating a "folder" in the cloth room on the second shift. He had been earlier employed for a period of a few months. A few days after his last employment, he applied for union membership and on or about September 21 began to wear a union badge to work, which fact was reported to Calhoun. Although the testimony in the record is in direct conflict on the point, the Board, by crediting Evans' testimony in its entirety and discrediting the pertinent part of the supervisor's testimony entirely, found that Supervisor Massey, by offer to Evans of promotion to a supervisory capacity, unsuccessfully attempted to persuade him to relinquish his union badge. Any authority of Massey to offer any such inducement is not made to appear and it is incredible that the newest employee in the plant would be considered for selection as a supervisor over the many employes with more experience and seniority. The Board further found that upon Evans' refusal to comply with Massey's purported request, Evans was laid off the following morning, September

26. The Company's assigned reason for the layoff of Evans was that the work of an employee, Dutton, with more seniority in the spinning room, had been completed and rather than lay off Dutton it was decided, in accordance with the Company's established seniority policy, to lay off Evans, the most recently hired employee in the plant, and transfer Dutton to fill Evans' job. Again, the Board in effect found that the explanation given by the Company for separating Evans was not reasonable and, in view of the fact that Evans' layoff followed soon after he openly evidenced his union adherence, the reason given by the Company was a mere "pretext" for ridding itself of a union member.

There is unrefuted evidence in the record that the impending probability of a reduction in available jobs and resultant layoff of some employees had been previously announced by plant officials at overseers' meetings. The evidence further discloses that Dutton's job had been completed and that Dutton was, in fact, transferred to the job vacated by Evans. Furthermore, the record shows without any substantial conflict that Evans was a new employee still subject to a 90-day probationary period; that such probationary employees are, in accordance with the special layoff provisions of the Company's Employee Relations Manual, the first ones to be laid off in the event of curtailment; that the Company's policy respecting layoffs is interdepartmental in nature; and that Evans, in addition to being a probationary employee, was the last one hired in the entire plant. Evans, himself, admitted that at the time he was employed he was informed that he would be on probationary status for 90 days. At the time of his layoff he demanded and received his wages then due although he would normally be paid as an employee on the next

regular pay day. This fact and the fact that he quickly sought and obtained other employment strongly indicate that he had no expectation of recall.

The Board points to the fact that while Evans was still being carried by the Company as laid off, two other new employees were hired without a notice of recall to Evans. This fact, standing alone, has no direct relation to the real reason for Evans' layoff in the first instance. The Company explains its failure to recall Evans by showing that, at the time the new employees were hired, Evans had obtained and was engaged in other employment which the Company's personnel manager felt was a better job than the ones for which the new employees were hired. There is no proof here of any established custom or practice of recalling laid-off *probationary* employees with no recognized seniority rights. If such probationary employee is laid off because his services are no longer needed, surely it cannot be successfully contended that he has a vested right to re-employment.

From a consideration of the entire record, the explanation for the layoff of Evans stands up under scrutiny and cannot be said to be unreasonable. See *N.L.R.B.* v. *Moore Dry Kiln Company*, 320 F. 2d 30 (5 Cir. 1963).

Discharge of McKinney

H. C. McKinney, Jr., had been in the employ of the Company for about fourteen years and had apparently performed satisfactorily during his tenure. When union organizational activity began at the plant, McKinney, together with Allen, was a moving spirit in promoting the campaign.

On September 20, 1961, the Company posted on the plant's bulletin boards a plant rule which reads as follows:

> "No person will be allowed to carry on union organizing activities in the plant during working hours. Anybody who does so *and thereby interferes with his own work or the work of others will be discharged.*" (Emphasis ours.)[5]

Sometime during September the Company ordered a number of copies of a reprint of a collection of magazine articles entitled "The Henderson Story." The articles, generally speaking, espoused the employer's point of view rather than that of the Union. Copies of "The Henderson Story" were made available to the Company's employees by the overseers and second hands. McKinney read the articles and found in them a paragraph which impressed him as supporting his view as to the value of a union. In direct violation of the plant rule quoted above and with knowledge of the rule and its announced penalty for violation thereof, McKinney circulated among the employees during working hours and, in some cases interfering with the work of others, insisted that they take time out to read the paragraph. In some instances McKinney's activities in this regard evoked antagonism and started argument. These activities came to the attention of his supervisor who sent McKinney home with orders to report to Overseer Snipes the following day. The supervisor transmitted a written report to Snipes. When McKinney reported the next day Snipes discharged him for the assigned reason that he had violated the posted rule.

The Board found that the reason assigned by the Company for McKinney's discharge was likewise a

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[5] It is of particular pertinence that the stated penalty of discharge was to be invoked in case the prohibited activity interfered with the offender's own work or the work of others.

mere "pretext" and that the real reason was McKinney's leadership and activity in the Union. The Board's finding in this regard was explained as follows: McKinney's vigorous and early support of the Union; the wearing of a union badge, openly, in the plant; management's knowledge of his union activities; the Company allowed other employees to read "The Henderson Story" during working hours but discharged McKinney for violating the so-called "no-solicitation rule"; the supervisor, Williamson, who ordered him off the job, told McKinney that the discharge was not his (Williamson's) doing but that "the orders came from higher up" although there was no evidence that those who were "higher up" had been apprised at that time of McKinney's violation of the rule; thereafter Williamson told another employee that he had his orders and that it was McKinney's job or his. From the latter two circumstances the Board concludes that the order to terminate McKinney was issued before the alleged violation of the posted rule. McKinney candidly admitted at the hearing that he showed the paragraph from "The Henderson Story" to about ten employees before he was sent home.

Board panel member Rodgers dissented from the conclusion of the two other members of the panel with respect to McKinney, saying: "I would find that McKinney was lawfully discharged for flagrantly violating a valid no-solicitation rule." We agree with the dissenting member of the panel. Furthermore, we find no substantial support in the record for the conclusion of the majority of the panel respecting McKinney's discharge and accordingly hold it to constitute error.

The Board declined to follow the holding of the Supreme Court in a somewhat similar case, stating that

it is inapplicable. But we are of the opinion that, generally, an employer may not be held to have been acting discriminatorily in distributing antiunion literature and otherwise engaging in antiunion solicitation while at the same time enforcing a rule prohibiting activities on the part of its prounion employees which disrupt regular work schedules and interfere with production. See *N.L.R.B.* v. *Steelworkers*, 357 U.S. 357 (1958). Implicit in the Supreme Court's holding in this regard is the proposition that an employer may, without being charged with discrimination, *discharge* employees who violate a *valid* no-solicitation rule while concurrently sanctioning the distribution of antiunion material. Were it otherwise, the employer would be powerless to enforce the rule.

We quote with approval and adopt that portion of the dissent of Board Member Rodgers as follows:

> "It is also clear that McKinney knowingly and flagrantly violated a validly promulgated rule, that discharge was the announced penalty for the violation of the rule, and that he was discharged when Respondent learned that the rule had been breached. Unlike my colleagues, I cannot infer from the facts in this record that McKinney was exempt from the plant rule merely because he was one of the Union's earliest and strongest supporters or because he wore a union button in the plant. Nor will I speculate that Respondent had issued an order to terminate McKinney before the above-described solicitation. There is absolutely no record evidence supporting such speculation."

Validity of No-Solicitation Rule Not in Issue

As previously noted,[6] the Union urges this court to pass upon the validity of the Company's posted no-solicitation rule. At the close of the hearing, General Counsel expressly disavowed any contention that the rule was in itself unlawful. Consequently, the Examiner found and the Board accepted the finding that the *validity* of the rule was not in issue.[7] Nevertheless, the Union asks us to find the rule unlawful.

Section 3(d) of the Act commits to the discretion of the General Counsel the decision as to whether he will issue a complaint[8] and his refusal to do so is final and unappealable.[9] The decision as to the *scope* of a complaint is for the General Counsel.[10]

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[6] See footnote 2, supra.

[7] If the validity of the rule were in issue here, we would call attention to Stoddard-Quirk Mfg. Co., 138 N.L.R.B. No. 75, wherein the Board itself said:

> "Almost from the outset the Board has held with court approval that an employer may *in the normal situation* make and enforce a rule forbidding his employees to engage in such union solicitation during working time ('working time is for work'). * * *." (Emphasis supplied.)

Also N. L. R. B. v. Avondale Mills, 242 F. 2d 669, 671 (5 Cir. 1957), where the court said:

> "There is and can be no dispute that the company had a right to prohibit union soliciation in its plant during working hours." (Cited cases omitted.)

[8] See International Union of Electrical, Radio and Machine Workers, AFL-CIO, v. N. L. R. B., 289 F. 2d 757, 760 (C.A. D.C. 1960).

[9] Retail Store Empolyees Union Local 954, etc. v. Rothman, 298 F.2d 330, and cases cited at p. 332 (C.A. D.C. 1962).

[10] See Piaseckit Aircraft Corporation v. N. L. R. B., 280 F. 2d 575, 586-88 (3 Cir. 1960).

The Board cannot entertain an amendment to the complaint which the General Counsel opposes. *International Union of Elec., Radio, etc.*, v. *N.L.R.B.*, 289 F. 2d 757, 762 (C.A. D.C. 1960). In that case the court agreed with the Board that the latter was without *power* to take action sought by the union when, at the hearing, as charging party, it formally moved to amend the complaint to include certain charges which had been dismissed by General Counsel. It follows that the Union could not put in issue before the Board, by its exceptions filed to the Examiner's report, a matter as to which the General Counsel had declined to allege illegality. In fact, by a prehearing amendment, General Counsel amended paragraph 14 of the complaint to allege, in subparagraph (c), that the Company "discriminatorily enforced plant rules posted on September 20, 1961, prohibiting union activities in the plant during working hours. * * *." By alleging discriminatory enforcement, General Counsel necessarily assumed a valid rule. The Board found that McKinney was discharged, not for violation of the rule itself but because of his union membership and adherence.

The Union asks this court's judgment on the merits of a matter never properly put in issue and not passed upon by the Board.[11] Its request must be denied. A court has no power to order the General Counsel to

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[11] In support of its position, the Union cites Labor Board v. Mackay Co., 304 U. S. 333, 351 (1938); N. L. R. B. v. International Brotherhood of Teamsters, etc., 225 F. 2d 343 (8 Cir. 1955); N. L. R. B. v. Puerto Rico Rayon Mills, Inc., 293 F. 2d 941 (1 Cir. 1961); and N. L. R. B. v. H. E. Fletcher Co., 298 F. 2d 594, 600 (1 Cir. 1962). As support for the Union's contention here presented, we find these cases unpersuasive.

issue a complaint and no power to require the Board to issue an order in a matter which is not before it. *Hourihan* v. *N.L.R.B.*, 201 F. 2d 187 (C.A. D.C. 1952), *cert. denied*, 345 U.S. 930 (1953).

The Board's order will be enforced insofar as it requires the Company to cease and desist from attempting to persuade its employees, by threats of reprisal or promises of benefit, to cease wearing or turn in union badges or emblems or, in any other manner, interfering with, restraining or coercing its employees in the exercise of rights guaranteed them in section 7 of the Act. In all other respects enforcement will be denied.

Enforcement granted in part and denied in part.

J. SPENCER BELL, Circuit Judge, dissenting:

I concur in the majority's denial of the Union's request that this court declare the Company's no-solicitation rule invalid. I also concur in the enforcement of that portion of the Board's order requiring the Company to cease and desist from "attempting to persuade its employees, by threats of reprisal or promise of benefit, to cease wearing or turn in Union badges or emblems" or, "in any other manner, interfering with, restraining or coercing its employees in the exercise of rights guaranteed them in Section 7 of the National Labor Relations Act."

I feel compelled to dissent from the remainder of the majority opinion, however, since I am persuaded that the trial examiner's Recommended Order, as af-

firmed by the Board,[1] is amply supported by substantial evidence in the record viewed as a whole. The Supreme Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951), held that a Court of Appeals is "not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." Nonetheless, a Court of Appeals is admonished that it "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Ibid.* I think that the majority failed to heed this admonition in the instant case.

In this respect the case is a departure from a series of cases decided by this court subsequent to *Universal Camera;* cases in which we enforced Board orders where the position taken by the Board had substantial support in the whole record, despite evidence to the contrary and despite our own notions as to how the case should have been decided in the first instance. See *e.g.*, *NLRB* v. *Lester Bros.*, Inc., 301 F.2d 62 (4 Cir. 1962); *NLRB* v. *Pugh & Barr, Inc.*, 231 F.2d 558 (4 Cir. 1956); *NLRB* v. *School Timer Frocks, Inc.*, 224 F.2d 336 (4 Cir. 1955). Sound policy considerations buttress our disposition of these cases, quite apart from the deference due the trial examiner and Board in their special area of competence. At an un-

[1] The Board declined to adopt the finding of the trial examiner that the Company had violated the Act by disparate application and enforcement of its no-solicitation rule. In all other respects the Board adopted as its order the trial examiner's Recommended Order.

fair labor practice proceeding, the trial examiner hears the testimony, notices the demeanor of each witness, and is, therefore, the one person able to make determinations of credibility from insights gained through personal observations.

In the instant case the trial examiner was required to determine the Company's real motive behind three discharges and also to determine whether certain activities of Company officials and supervisory personnel involved a threat of reprisal or force or promise of benefit and thereby exceeded the permissible bounds of freedom of expression.[2] These ultimate determinations required the trial examiner to first decide between conflicting versions of what occurred, and even when there was little dispute as to basic facts, to decide the most logical inferences to be drawn therefrom. The trial examiner did not resolve all questions of credibility against Company witnesses; nor did he draw all inferences adverse to the Company; indeed he found that the Company had committed only a little more than half of the unfair labor practices with which it had been charged. My reading of the record convinces me that it furnishes substantial support for those unfair labor practices which were actually found. In setting aside those findings of the trial examiner, and the Board's affirmance,[3] I think the majority has attempted to retry this case *de novo* in contravention of the principles of review laid down in *Universal Camera*.

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[2] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C.A. § 158(c).

[3] See n.1, *supra*.

While I deem an extended discussion of all the alleged unfair labor practices unwarranted, I should like to pinpoint my disagreement with the majority as to one. The record reveals that after the Company became aware of the Union's organizational drive, Sam Jordan, the Company's personnel director, asked Ernest E. Ivester, a rank and file employee, if he would be willing to help organize a group "for those not interested in either . . . side." The majority readily admits that the purpose of this organization was "to attempt to combat the organizational efforts of the Union." In furtherance of this plan, Jordan interviewed during working time some 15-25 mill employees and inquired if they would be willing to meet together and discuss "the problem." The trial examiner credited Ivester's testimony that Jordan later turned the list over to him, explaining that "if I [Ivester] wanted to take it from there, and mail out some invitations, or get in touch with them in any way I saw fit, then he had this many names and addresses that I could get started on." Ivester thereupon sent out invitations, and the "Citizens Club" came into existence with Ivester its Chairman. On these facts the trial examiner inferred that Jordan had been the moving spirit in the formation of the organization, and considered it "doubtful that any such movement could or would have been successfully launched without Jordan's help." The trial examiner found no further assistance to or participation in the Citizens Club by any Company official or supervisor.

Based on the foregoing, the trial examiner, affirmed by the Board, found that the Company had interfered with, restrained, and coerced its employees by "Jordan's suggestion to Ivester in September that Ivester help organize an anti-union movement and his furnishing Ivester with a list of employees expected to

support such a movement." The Company was, therefore, ordered "to cease and desist from suggesting that its employees organize to combat any labor organization or assisting employees to start such a movement."

The majority absolves the Company of responsibility for Jordan's conduct by pointing out that there was no evidence that Jordan was acting as an instrument or agent of management. In order to hold the Company responsible for an unfair labor practice the majority apparently would have required either prior authorization or knowledge or subsequent ratification of Jordan's scheme by Andrew B. Calhoun and J. R. Swetenburg, the two principal resident officers of the Company. I think such requirements contrary to both the specific language of the National Labor Relations Act and to the decided cases.

Section 2(2) of the Act [4] provides that "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly. . . ." Section 2 (13) [5] further provides that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, *the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.*" (Emphasis added.) Section 2(2), according to the House Committee, was intended to make "employers responsible for what people say and do only when it is within the *actual* or *apparent* scope of their authority" and thus "to make the ordinary rules of the law of agency equally appli-

[4] 49 Stat. 450 (1935), 61 Stat. 137 (1947), 29 U.S.C.A. § 152(2).

[5] 49 Stat. 450 (1935), 61 Stat. 137 (1947), 29 U.S.C.A. § 152(13).

cable to employers and to unions." H. R. Rep. No. 245, 80th Cong. 1st Sess., p. 11. Section 13 according to the later Conference Report, meant that "both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency (and only ordinary evidence will be required to establish the agent's authority)." H. R. Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 36.

These sections changed the import of old Section 2(2) of the Wagner Act which had defined employer to include "any person acting in the interest of an employer, directly or indirectly." It seems clear that the amendment of Section 2(2) and the addition of Section 2(13) were aimed at exonerating management of responsibility for acts undertaken by those beyond its control and direction. But management must be held responsible for the acts of those over whom it has the right of control and direction, and it is immaterial whether such acts are committed with the knowledge and acquiescence of superiors, *NLRB* v. *Texas Independent Oil Co.*, 232 F.2d 447 (9 Cir. 1956), or without their knowledge, under the cloak of apparent authority, *NLRB* v. *Houston Chronicle Publishing Co.*, 300 F.2d 273 (5 Cir. 1962); *United Assn. of Journeymen and Apprentices* v. *NLRB*, 287 F.2d 354 (D.C. Cir. 1961); *Time-O-Matic, Inc.* v. *NLRB*, 264 F.2d 96 (7 Cir. 1959); *American Rubber Products Corp.* v. *NLRB*, 214 F.2d 47 (7 Cir. 1954).

At a minimum, Jordan, acting in a supervisory capacity, as personnel director of the Company, had apparent authority to act in behalf of management in the formation of the Citizens Club. Certainly to rank and file employees at the plant, it must have appeared that Jordan was acting to carry out management pol-

icies. *NLRB* v. *Texas Independent Oil Co., supra; NLRB* v. *Geigy Co.*, 211 F.2d 553, (9 Cir.), *cert denied*, 348 U.S. 821 (1954). In these circumstances, I think the trial examiner and Board were compelled to find that the Company was responsible for the actions of Jordan. Any other finding would have been contrary to the letter and spirit of the National Labor Relations Act. The action of the majority goes far in insulating the top echelons of management from responsibilities which are, in all fairness, undeniably theirs.

DECREE

THIS CAUSE came on to be heard upon the petition of the Textile Workers Union, AFL-CIO, to review and modify the order of the National Labor Relations Board issued on March 27, 1963, in proceedings before the said Board entitled "Wellington Mill Division, West Point Manufacturing Company and Textile Workers Union of America, AFL-CIO, Case Nos. 11-CA-1821, 1823"; upon the answer of the National Labor Relations Board to the petition to review and modify; upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the said order of the National Labor Relations Board be, and it is hereby, enforced insofar as it requires the Wellington Mill Division, West Point Manufacturing Company to cease and desist from attempting to persuade its employees, by threats of reprisal or promises of bene-

fit, to cease wearing or turn in union badges or emblems or, in any other manner, interfering with, restraining or coercing its employees in the exercise of rights guaranteed them in section 7 of the National Labor Relations Act, and in all other respects enforcement is denied; and that the said Wellington Mill Division, West Point Manufacturing Company, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order as so enforced contained, in accordance with the opinion of the Court filed herein.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

HERBERT S. BOREMAN
United States Circuit Judge

FILED—MARCH 25, 1964
MAURICE S. DEAN, *Clerk*

I dissent:

J. SPENCER BELL
United States Circuit Judge.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivsion thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such organization.

* * * *

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such ac-

tivities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

Sec. 10. * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occured or wherein such person resides or transacts business, for the enforcement of [its] order * * * Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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